WHO SHALL PAY?

An Argument For a Universal Right to Counsel For Indigent Defendants

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> It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ shuc aid. No court would be respected, or respect itself, to sit and hear such a trial.
>
> The defense of the poor, in such cases is a duty resting somewhere, which will at once be conceded as essential to the accused, to the court, and to the public.
>
> And the only question is, who shall pay?
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> --Webb v. Baird, 6 IND 13, 18 (1854)

The Indiana Supreme Court, in 1854, spoke to the issue of appointed counsel for indigent defendants. To these early Hoosier justices it was a matter of conscience, a matter of public and self-respect, that counsel be provided for those unable to afford it. After all, how could a lay-man, hailed into an unfamiliar adversary proceeding adequately defend himself without the knowledge and expert-ise of counsel? The necessity for such aid was obvious to the justices. Their only reservation was a matter of fiscal policy.

While this realization of fundamental fairness was basic to the Hoosier Supreme Court, at least in this instance, other courts were not so disposed. It was not until 1932, some seventy-eight years later, that the United States Supreme Court declared that a right to counsel existed under the federal constitution through the Fourteenth Amendment.[1] Since that time, the Supreme Court has slowly, and somewhat less than methodically, extended the right to counsel from capital offenses[2] to felonies,[3] misdemeanors[4] and into some civil areas.[5]

The courts have, however, stopped short of the full realization of the promises of the Fourteenth Amendment. Logic and basic concept of fundamental fairness implies--if not requires an extension of the right to appointed counsel for indigents into every type of adversary judicial proceeding.

Before venturing into the realm of judicial precedent establishing the right to counsel, it is essential to have

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[1] Powell v. Alabama, 287 U.S. 45 (1932).

[2] Ibid.

[3] Gideon v. Wainwright, 372 U.S. 335 (1963).

[4] Argersinger v. Hamlin, 407 U.S. 25 (1972).

[5] These areas include paternity suits and actions to terminate parental rights. These will be discussed at length in section II.

an understanding of two constitutional concepts upon which the right is founded: The concepts of equal protection and due process.

I. THE PROMISES OF A CIVILIZED SOCIETY

The concepts themselves, while relatively concise, have a broad and complex interpretative scope. The Fourteenth Amendment states:

> No State shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[6]

While this "Civil War" Amendment was originally created for the purpose of protecting former slaves in the south it has since been expanded into almost all aspects of the judicial process.[7]

The oldest of two doctrines, in terms of wide spread judicial application is the Due Process Clause. This clause is essentially a promise of procedural processes if the government acts to deprive a citizen of life, liberty or property. Justice Harlan, attempting to define the due process promise, said:

> ...There can be no doubt that at a minimum... the abstract words of the Due Process Clause... require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.[8]

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[6] United States Constitution, Fourteenth Amendment (1868)

[7] For a detailed discussion of the application of the Fourteenth Amendment see: Meyer. The History and Meaning of the Fourteenth Amendment, (1977); and, Cortner. The Supreme Court and the Second Bill of Rights, (1981).

[8] Boddie v. Connecticut, 401 U.S. 371, 377 (1971)

In order to erect any substantial barrier of procedural due process, the judiciary must be presented with evidence in two areas. First, it must be shown that a state is acting to deprive a citizen of life, liberty or property, and second that the interests involved warrant a certain level of procedural protection.

In the realm of deprivations of life, state executions are the most obvious example. In recent years, the Court has upheld state-imposed executions providing that imposition of the penalty is discretionary and objective standards exist to control the discretion of those imposing the penalty.[9] While a deprivation of life by execution is obvious, the Court has also entered into definitional gray areas by attempting to determine what process is due for protecting life of an unborn fetus.[10]

Governmental actions to deprive persons of property take a variety of forms, both direct and indirect. The scope of these activities is almost universal, with the realization that whenever a government acts to enforce the private property claim of one person against another, that government has acted to deprive someone of property.[11]

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[9] Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

[10] Roe v. Wade, 410 U.S. 113 (1973).

[11] Snidach v. Family Finance Corp., 395 U.S. 377 (1969).

Thus, even in the small claims jurisdiction of a court, the state is taking action to deprive someone of property and those persons must be afforded some standard of due process.

Perhaps the broadest area of protection afforded by the Due Process Clause is that of "liberty". This concept encompasses three distinct forms involving governmental restraints on: 1) Physical freedom, 2) The exercise of fundamental constitutional rights, and; more generally, 3) other forms of freedom of choice or action.[12]

In a general setting, the concept of physical liberty prevents the government from physically restraining a person without following their procedures. The obvious application of this concept is within the realm of criminal procedure.

Physical liberty has been expanded into non-criminal settings to require procedural safeguards similar to criminal actions in civil commitment hearings[13] and expansive substantial rights for the juvenile divisions of our courts.[14] Further, the construct has been extended into school settings where the threat to physical liberty through corporate punishment seems quite insubstantial.[15]

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[12] Nowak, et.al.Handbook on Constitutional Law, (1978).

[13] O'Connor v. Donaldson, 422 U.S. 563 (1975).

[14] In re Gault, 387 U.S. 1 (1967).

[15] Ingraham v. Wright, 430 U.S. 651 (1977).

Liberty, under the Fourteenth Amendment, also encompasses the right to engage in certain constitutionally protected activities. The area of free speech has long been an area of extensive due process protection against state intervention. The Supreme Court has held that under the Fourteenth Amendment "a State is not free to adopt what ever procedures it pleases for dealing with obscenity... without regard to the possible consequences of constitutionally protected speech."[16] Further, the Court has ruled that any system restraining free expression bears a "heavy presumption against its constitutional validity."[17]

The concept of protected liberties also extends into areas of personal choice not constitutionally enumerated. The broad-ranging nature of these non-constitutionally protected liberties was described by Justice Reynolds who stated,

> ...it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[18]

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[16] Marcus v. Search Warrant, 367 U.S. 717,731 (1961).

[17] Bantam Books Inc. v. Sullivan, 372 U.S. 58, 70 (1961).

[18] Meyer v. Nebraska, 262 U.S. 390 (1923).

This passage would tend to suggest that almost any conceivable human activity, when infringed upon like the government can be extended due process protection.

A preliminary conclusion that action by the state constitutes a deprivation of life, liberty or property must be followed by a second determination. The Court then determines what process is due for that protected right. This second hurdle calls into play a complex and many times subjective process of judicial challenging. The Court must consider three factors:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interests through the procedures used, and the probable value, if any, of the additional or substitute procedural safeguard; and finally, the government's interest including the function involved and the fiscal and administrative burdens that the... procedural requisites would entail.[19]

In effect, the balancing requirements affect the degree of process afforded once life, liberty or property are threatened. This two-pronged approach is the fundamental basis of due process application.

The Due Process Clause has a close relative in substantive doctrine, the Equal Protection Clause. In general terms, the Equal Protection Clause is a bar against the deprivation of fundamental rights and privileges of citizens by discriminatory classifications of law. Justice

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[19] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Black said that the Equal Protection Clause requires "that all people must stand on an equality before the bar of justice in every Amercian court."[20] Of course, the application of equal protection is not so simplistic.

In applying this concept, the Court has developed what has been described as a "rigid two-tier attitude."[21] On the first level, where judicial scrutiny is minimal, the classification is valid if the standard is not arbitrary; if there is a deference in the subject area to legislative determinations; and, if the classification is plausibly related to legimate state interests. The second level, requiring "strict" judicial scrutiny, are governmental classifications affecting fundamental constitutional guarantees or, classification made along "suspect" lines. The latter classification demands that the enactment was drawn upon "compelling" state interest in order to be sustained.[22]

The Courts' application of the Equal Protection Clause under suspect classification is almost always fatal for the statutory system. For example, since 1945, no statutory scheme based upon the suspect classification of race has been sustained by the Court.[23] Other classifications given strict

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[20]Chambers v. Florida, 309 U.S. 227 (1939).
[21]Polyviou. The Equal Protection of the Laws,(1980) p. 179.
[22]Ibid.
[23]Nowak, et.al., p. 549.

judicial scrutiny, but not yet accorded the full status of "suspect" clauses are those based upon illegitimacy,[24] alienage[25] and gender.[26] Fundamental rights areas garnering "strict" scrutiny have included the rights of franchise[27] and privacy.[28]

From this preliminary review of the due process and equal protection doctrines, it becomes apparent that they are related by more than just their placement in the Fourteenth Amendment. Both concepts have virtually the same application: they both seek to restrict state action against individuals. Noting this similarity, Chief Justice Earl Warren wrote:

> The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of the law,' and, therefore, we do not imply that the two are always interchangeable phrases. But as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[29]

If Justice Warrens' analysis is correct, the Equal Protection and Due Process Clauses can be differentiated by the legislative goal in creating the distinction. The Equal Protection Clause, quite simply, protects groups of

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[24] Levy v. Louisiana, 391 U.S. 68 (1968).

[25] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[26] Reed v. Reed, 404 U.S. 71 (1971) and Frontiers v. Richardson 411 U.S. 677 (1973).

[27] Kramer v. Union School District, 395 U.S. 621 (1968).

[28] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[29] Bolling v. Sharpe, 347 U.S. 497,499 (1953).

people against statutory systems aimed at depriving those groups of certain fundamental rights. While the Due Process Clause, can be, and often is, applied with the Equal Protection Clause, the concept of equal protection provides further protection to groups.

II. THE PROTECTION OF LIFE AND LIBERTY A "DUTY RESTING SOMEWHERE"

The concept of due process was the first of the Fourteenth Amendment guarantees to be applied to the right of appointed counsel. The first case in which due process was applied was Powell v. Alabama in 1932.[30]

Powell was a combined action arising from the treatment of three black defendants accused of raping two white girls following a racial altercation on a train. Following the indictment of the defendants on March 31, they were arrainged and pleaded not guilty. The trial record lacks any reference to the defendants wishes regarding appointment or employment of counsel. It should be noted, at this point, that the defendants were residents of other states with no method of communication with their respective homes, and they were described by the records as ignorant and illiterate.[31]

On the first day of the trial, following a lengthly dialogue with the judge, a member of the local bar accepted the responsibility of representing the defendants. Prior to this time the judge had "appointed all members of the bar" for the purpose of arraigning the defendants.

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[30] Powell v. Alabama, supra.

[31] Ibid., at 52.

After acknowledging these factors the High Court went on to overturn the convictions of the defendants on the issue of "whether the denial of the assistance of counsel contravenes the Due Process Clause of the Fourteenth Amendment to the federal Constitution."[32]

Interestingly, the Court's due process analysis did not take a revolutionary, precedent-setting tone. Instead, the Court developed its analysis from established principles of the common law existing in the colonies prior to ratification of the Fourteenth Amendment. To the Court, the concept of a right to counsel was not new.

Following a lengthy review of English Common law and the early state constitutions, the Court concluded that in all of the early states, counsel was recognized as a matter of right relating to capital and serious crimes where the life of the defendant was threatened.

The justices concluded

> ...that the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.[33]

The Court further stated that the right to counsel was not to be applied to the states because of its existance in the federal Constitution, rather, because the nature of the necessity of counsel was "included in the conception of due process of law."[34]

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[32] Ibid., at 60.

[33] Ibid., at 67.

[34] Ibid., pp. 67-68.

The right to counsel was thus equated to the procedural requirements of due process, separate and distinct from the original Bill of Rights.

The nature of counsel as a requisite of fair process was further enunciated by the Court insistance that,

> the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. [35]

The Court then declared, that even in the absence of statutory authority, the trial court was under the "duty" to appoint counsel-and counsel was under a "duty" to accept appointment-to preserve the fundamental fairness of the proceding.[36]

Despite the comprehensive evaluation of the necessity of counsel to insure due process, the Court's final holding fell in much narrower terms. The justices concluded that this duty and the preservation of due process applied only in capital cases "where the defendant is unable to employ counsel, and is incapable of adequately making his own defense because of ignorance, feeblemindness or illiteracy...".[37]

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[35] Ibid. pp 68-69.

[36] Ibid., at 73.

[37] Ibid., at 71.

The Court, however, should not be criticized for the scope of their judgment in Powell. They were simply adhering to the "rule" that constitutional questions must be decided upon the narrowest grounds possible.[38] The justices make the decision appropriate for the scope of the facts involved in the present case. The majority immediately prior to stating their holding considered "other criminal prosecutions," but refused to anticipate the future extension of the doctrine.[39]

The Court first pondered the proposition of extending the right to counsel beyond the scope of Powell nine years later in Betts vs. Brady.[40] In this case, the indigent defendant petitioned the Maryland court for appointed counsel at his arraignment. The judge denied his request because it was "not the practice in Carroll county to appoint counsel for indigent defendants save in prosecutions for murder and rape."[41] Despite the court's refusal, and without waiving his asserted right to counsel, the defendant conducted his own defense. Following his conviction, he appealed solely on the basis that the trial court had denied his

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[38]For a complete discussion see, Aschwander v. TVA, 297 U.S. 228 (1936).

[39]Powell v. Alabama, supra. at 71.

[40]Betts v. Brady, 316 U.S. 454 (1940).

[41]Ibid., at 457.

application for counsel in violation of the provisions of the Fourteenth Amendment. In a 6-3 decision the U. S. Supreme Court upheld the defendants conviction.[42]

Referring to Powell and its companion cases, the Justices refused to extend the procedural protections of the Due Process Clause absent a showing that the defendant was incapable of conducting his own defense (i.e.,absent a showing of ignorance, feeble-mindedness or illiteracy). In doing so, the Court reverted to a substantive, rather than a procedural test of due process.

> The phrase (due process of the laws) formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights.
>
> Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may in other circumstances, and in the light of other considerations, fall short of such a denial.[43]

The Betts court reevaluated the long line of common law relating to the "fundamental nature" of the right to appointed counsel and, despite the majority in Powell, held that the intent of the early state constitutions was only to bar rules denying counsel to defendants. In other words, the state was obligated in all criminal prosecutions to "allow" representation by counsel, but

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[42] Ibid.

[43] Ibid., at 462.

the state had no affirmative duty to appoint counsel for indigents.[44]

The protections afforded to indigents was thus reduced in non-capital cases from the potential status as a procedural rule to less certain test of substantive fact.

As a result, the extension of the procedural protections of due process were stunted. The Supreme Court, from 1941 to 1963 refused to apply due process except as a substantive test of fundamental fairness. The assessed need for representation was thus subjected to the subjective whims of nine men in Washington. This is not to imply that the Court ignored the right to counsel under the Fourteenth Amendment, but rather interpreted its application on a case by case basis. In effect, this interpretation allowed state courts to procede in actions that would have been held unconstitutional in similar cases on the federal level.[45]

Under the Betts doctrine, only the most extreme conduct by state courts constituted a constitutional denial of the right to counsel. Probably the most clearcut example of the subjective nature of the Betts doctrine came before the Court in 1946.[46] In a per curiam decision, the justices overturned the Michigan conviction of Rene De Meerleer on the charge of murder.

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[44] Ibid., at 466.

[45] Bute v. Illinois, 333 U.S. 640, 649 (1947).

[46] De Meerleer v. Michigan, 329 U.S. 663 (1946).

To the justices, the facts of De Meerleer spoke for themselves.

> On May 16, 1932, an information was filed in the Circut Court of Lenawee County, Michigan, charging the petitioneer, then seventeen years of age... with the crime of murder. On the same day, petitioneer was arraigned, tried, convicted of first-degree murder and sentenced to life imprisonment.[47]

During the entirety of this one day procedure, the defendant was not advised of his right to counsel nor was he provided with counsel. No evidence was introduced on his behalf and De Meerleer did not cross-question any of the states' witnesses.

On the basis of these facts, in a two-page per curiam, the Court found that De Meerleer was "deprived of rights essential to a fair hearing under the federal Constitution."[48] Other convictions for non-capital crimes, absent a showing of such extreme circumstance, were upheld by the Court.[49]

During this early era of constitutional adjudication, two elements in the application of the right to counsel became clear. First, the justices seemed only willing to apply the protections of due process when the state was acting to deprive a citizen of life. Only in the trial of capital crimes for which the penalty could be death,

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[47] Ibid., at 664.

[48] Ibid., at 665.

[49] Gibbs v. Burkes, 337 U.S. 773 (1948); and, Bute v. Illinois, supra.

was the appointment of counsel required. Second, the relative value of representation by counsel as a fundamental element of four judicial proceedings, was at a low ebb. The justices, by implication, are effectively denying the value of counsel except in life-threatening situations. It must be noted, however, that the view of the Court during this era was not unanimous. The dissenters, lead by Justice Douglas and Black sharply criticized the position of the majority, calling for the nullification of the Betts decision.[50]

It was not until 1963 in Gideon v. Wainwright[51] that the dissenter's request for a reconsideration of Betts was granted. As in Betts, the petitioneers only grounds for appeal was that the failure of the trial court to appoint counsel for his defense, constituted a denial of due process.

In less than six pages, the majority, led by Justice Black, struck down the Betts doctrine. The substantive test, requiring an evaluation of the "totality of the facts" was obliterated and replaced with a solid procedural rule. Noting that the Court had erred in the creation

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[50] Betts v. Brady supra., Gibbs v. Burkes, supra., and Bute v. Illinois, supra.

[51] Gideon v. Wainwright, supra.

of the Betts doctrine, Justice Black concluded that,

> a provision of the Bill of Rights which is ' fundamental and essential to a fair trial ' is made obligatory upon the States by the Fourteenth Amendment.[52]

Thus, by incorporating the promises of the Sixth Amendment into the Fourteenth Amendment, and thereby applying the Sixth Amendment to the states, the Supreme Court established the fundamental and essential nature of the right to appointed counsel.

The Court also recognized another principle in Gideon fundamental to the guarantee of due process. In a concurring opinion by Justice Clark, the Court effectively eroded the paper distinction between the level of due process guaranteed by the Fourteenth Amendment to capital and non-capital offenses. Taking special note of the distinction established by the Betts decision, Clark asked:

> How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than a deprival of life - a value judgment not universally accepted - or that only the latter deprival is irrevocable?[53]

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[52] Ibid., at 342 .

[53] Ibid., at 349 .

This realization of the concept of physical liberty and its central nature to cases involving the right to appointed counsel had not been previously enunciated by the Supreme Court. Gideon in this respect, reflects an extension of the protective nature of procedural due process. The Court has thus acknowledged a conceptual expansion of due process into the realms of physical liberty.

This expansion was the central issue for the Court in 1972 in Argersinger v. Hamlin.[54] Here the petitioneer questioned the lower courts interpretation of Gideon, being that appointment of counsel was required only in felony prosecutions. The Court, again extending the procedural protections to be afforded for physical liberty, struck down the distinction between felony and misdemeanor classifications. The Court ruled that no person could be imprisoned, even for violation of a municipal ordinance, if he was denied the right of counsel.[55] Justice Douglas noted that regardless of the severity of the sentence, "the accused will receive 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy."[56]

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[54] Argersinger v. Hamlin, supra.

[55] Ibid., at 40.

[56] Ibid.

It is important to note at this point that Argersinger is distinct on previous ruling in another aspect. Argersinger represents a more mature application and testing of due process. While it is true that the Court recognized the fundamental interest of personal liberty it is not without some of judicial balancing that the Court extended due process protection to that interest.

Once the Court had concluded that great private interests were involved (i.e., a deprivation of physical liberty), the justices went on to consider that private interest in comparison to two other factors. First, whether additional procedures would reduce the risk of erroneous deprivation; and, second, what impact these measures would have on governmental interests. The court was quick to conclude that the appointment of counsel would decrease erroneous convictions.[57]

The justices also sought to justify their decisions on more of a practical ground. They considered a societal question being that of the decision's possible impact on the legal profession, i.e. overburdening the entire profession. Again the Court relied on statistics forecasting a measureable increase in bar membership adequate to meet the new demand.[58]

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[57] Ibid., at 57.

[58] Ibid., at 37, note 7.

These actions can be classified as a process of judicial balancing. As described in earlier analysis, the Court, in extending due process protection, tends to weigh the prospective protection against non-constitutional standards. Thus, while a fundamental interest maybe defined, due process protection is not always extended to cover that interest because of competing public interests. This function of judicial balancing will become even more apparent when considering extension of the right to appointed counsel in civil areas.

Having established the fundamental nature of the right to counsel in fair procedures, the justices opened another area of constitutional litigation on equal protection grounds. The first hint of the equal protection rationale came in Justiee Black's 1942 dissent in Betts.[59] Commenting on the criminal process, he stated that

> a practice cannot be reconsidered with 'common and fundamental ideas of fairness and right," which subjects innocent men to increased dangers of conviction merely because of their poverty.[60]

Calling for a more liberal rule, for the appointment of counsel Black, concluded: "Any other practice seems to me to defeat the promise of our democratic society to provide

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[59] Betts v. Brady, supra, at 474.

[60] Ibid., at 476.

equal justice under the law."[61]

While the seed of this constitutional doctrine was sown in Betts, it did not begin to grow until 1956 in Griffin v. Illinois.[62] The question was not whether the state was required to appoint counsel, but rather whether the state must provide a free transcript to an indigent who wished to appeal his conviction. The state agreed that because there were no constitutional requirements for appeals, the state had no obligation to remove economic barriers beyond the trial level. The Court, led by Justice Black, rejected the states' contention relying heavily upon statistics showing that convictions on appeal are often overturned.[63] The justices concluded that,

> to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside.[64]

The entire basis of the decision in Griffin rests upon one phrase, "there can be no equal justice where the kind of trial a man gets depends upon the amount of money he has."[65]

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[61] Ibid.

[62] Griffin v. Illinois, 351 U.S. 12 (1956).

[63] Ibid., at 18, note 14.

[64] Ibid., at 18.

[65] Ibid.

A further development of the equal protection rationale came in Burns v. Ohio.[66] The situation was identical to that of Griffin except that Burns' appeal was discretionary, where Griffin's appeal was a matter of right. The state argued that this fact distinguished Burns from Griffin with the latter having no application to the former. The Court soundly rejected this claim arguing that under in the state's interpretation, indigents are denied the opportunity to seek the discretionary review of the Ohio Supreme Court. Thus, effectively granting those who can afford the transcript fee a right over and above the rights of indigents.[67] Chief Justice Earl Warren added that, "there is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendents."[68]

The application of the Equal Protection Clause for indigents on appeal was furthered in Douglas v. California.[69] In Douglas, a single public defender was appointed at the trial level to represent two indigents on felony charges. The defendants petitioned the court for separate counsel and a continuance. These requests were denied. The two were convicted, and on appeal of right, requested the appointment

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[66]Burns v. Ohio, 360 U.S. 252 (1959).

[67]Ibid., at 257.

[68]Ibid., at 257-258.

[69]Douglas v. California, 372 U.S. 353 (1963).

of counsel. The appellate court denied this request under a California procedural rule authorizing such a denial if the appellate court determines there is no merit in the appointment of counsel.[70]

In a majority opinion by Justice Douglas, the Court overruled the California appeals court. In language strongly reminiscent of Griffin, Douglas concluded:

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that the case is without merit, is forced to sift for himself.[71]

Thus, by the nature of the equal protection doctrine, states cannot erect procedural rules that would create distinctions of right between indigent and non-indigent groups. This has been demonstrated in the cases just reviewed: in Griffin an indigent appealing of right must be provided a transcript; in Burns an indigent seeking a discretionary appeal must also be provided a transcript; and, in Douglas an indigent must be appointed counsel on appeals of right. This pattern implies that court-appointed counsel on discretionary appeals would be required to satisfy equal protection.

This pattern was broken by the Supreme Court in Ross v. Moffit.[72] In Ross, a 6-3 majority denied the right

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[70] Ibid., at 354-355.

[71] Ibid., at 357-358.

[72] Ross v. Moffit, 417 U.S. 600 (1974).

of appointed counsel for indigents on a discretionary appeal. Justice Rehnquist speaking for the majority, after reviewing the rationale in Douglas and Burns, concluded:

> there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of the Court.[73]

Rehnquist noted "other decisions" and concluded that the Fourteenth Amendment "does not require absolute equality or precisely equal advantages."[74]

In subsequent analysis, Rehnquist reasoned that the equal protection doctrine "is not one of absolutes, but one of degrees."[75] This analysis of degree which terminates the right of counsel on discretionary appeal, is of great importance. At this mystical demarcation, as noted by one author, the relationship between the state and the indigent defendant changes. The state, according to Rehnquist,[76] changes from a duty of providing "equal opportunity" to a duty of providing an "adequate opportunity to present his claims fairly in the context of the State's appellate process."[77]

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[73] Ibid., at 612

[74] Ibid.

[75] Ibid.

[76] Ibid., at 612-613.

[77] 50 IND. LAW R. 161 (1974).

For all practical purposes the equal protection doctrine acts to prevent states from breaking economic barriers to prevent indigents from vindicating constitutionally defined rights. The extent of the right to appointed counsel on appeal, however, is not clear. Moffit indicates that discretionary appeals do not require the appointment of counsel under the equal protection doctrine. Unfortunately, Rehnquist's opinion lacks any concrete standards by which to judge the state's newly defined duty to indigents. This opinion seems to be askew of the Court's typical equal protection analysis.

Having solidly established the rights to counsel on due process and equal protection grounds in criminal procedings, questions began to arise as to counsel requirements to insure fair civil actions. A great paradox seemed to be building within a constitutional framework. Simply stated, if a citizen's liberty was put into such great jeopardy in criminal misdemeanor cases, could not a potentially greater deprivation of liberty result if counsel were not appointed in civil areas? Does a criminal charge, by its nature, create a greater threat to one's liberty than a civil charge?

These questions of personal liberty have been debated rather cautiously in state appeals court throughout the nation. These constitutional discussions have centered in three general topic areas including: paternity suits, dissolutions and proceeding to terminate parental status.

The results of these debates are varied with some jurisdictions extending a right of appointed counsel and others denying it.

Termination of parental rights has gained a great deal of attention in courts on the state level. As of 1977, nine states[78] had concluded that indigent parents have a constitutional right to counsel when the state threatens their parental status at the trial level.[79]

Constitutional analysis at the state level seems to reflect the same belief that the parent-child relationship is protected under the Fourteenth Amendment's definition of liberty.[80] The New York court noting that "substantial rights" were involved declared;

> A parent's concern for the liberty of the child, as well as his care and control, involves too fundamental an interest in right to be relinquished to the state without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer. To deny legal assistance under such circumstances would...constitute a violation of his due process rights and...a denial of equal protection of the laws as well.[81]

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[78] California, Maryland, Nebraska, New Jersey, New York, Oregon, Pennsylvania, Washington and West Virginia.

[79] 80 ALR3d 1141,1148.

[80] Pennyslvania, In Re the Adoption of I 312 A2d 601 (1973); Washington, In Re Welfare of Luscier 524 P2d 906 (1974)' West Virginia, State ex. rel. Lemaster v. Oakley 203 SE2d 140 (1974); New York, Re B. 285 NE2d 288 (1972).

[81] Re B. Supra., at 290.

The Washington court, like many of its sister jurisdictions, noted that the requirement of appointed counsel may improve the fairness and accuracy of the proceeding. This stride is accomplished by creating a better balance of legal knowledge and expertise between the state and the indigent parents.[82]

By taking this action, the state jurisdictions have effectively eroded the distinctions between "civil" and "criminal" proceedings in regard to procedural requisites. The focus is no longer upon the classification of the hearing, but rather the nature of the private interests involved. As one jurisdiction concluded,

> whether the proceeding be labeled civil or criminal, it is fundamentally unfair, and a denial of due process of law for the state to seek removal of the child from an indigent parent without according that parent the right to be assistance of court-appointed...counsel.[83]

Not only is there division within the states as to the right to counsel in parental right terminations, there is also sharp division between justices of the United States Supreme Court on the same issues. The Court considered the issue in 1981 in Lassiter v. Department of Social Services.[84]

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[82] In Re Welfare of Luscier, Supra.

[83] Re the Adoption of I. Supra., at 603.

[84] Lassiter v. Department of Social Services, 452 U.S. 18 (1981).

The result was a 5-4 decision with the majority concluding that no inherent procedural right of counsel existed under the Fourteenth Amendment for indigent parents in parental right terminations.

Following a three part analysis, the majority concluded that while no universal procedural right to counsel existed, a "case by case" approach could be utilized to test the "fundamental fairness" of each individual proceeding.[85] The dissenters, following the same three-part analysis but coming to an opposite result, sharply criticize the Court for adopting an "ad hoc approach" that had been "thoroughly discredited" twenty years before in Gideon v. Wainwright.[86]

The dissenters' analysis of the need for uniform procedural right to counsel in parental right terminations, had three distinct elements identical to the rationale of the majority. First, the parent-child relationship was acknowledged as a unique and guarded right fundamental to the protected concept of liberty. Second, the complexity and adversary nature of such proceedings presented a danger of erroneous holdings if the parent was not equipped with a skilled attorney. Third, the state has a vested interest with

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[85] Ibid., at 33.
[86] Ibid., at 35.

the parents, for an accurate determination as well as an opposing monetary interest in terms of providing counsel and lengthening procedures.[87]

In defending their argument for the extension of the procedural right to appointed counsel in this area, the dissenters argued that such procedural norms are established to insure that justice is done in every case and to prevent "unpredictable and unchecked adverse governmental action" against the fundamental interests of indigent defendants.[88] The dissenters added that the majority's holding effectively undermines the concept of "general fairness" and "society's commitment to the rule of law."[89]

Justice Stevens, in a separate dissent, argued that the Court's action deprived indigent defendants of liberty, by disrupting natural parent-child relationships, and property, by destroying statutory rights of inherents.[90] Stevens also sharply criticized the rationale employed by the majority focusing on the monetary interests of the state, concluding that:

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[87] Ibid., pp. 35-60.

[88] Ibid., at 50.

[89] Ibid.

[90] Ibid., at 60.

> the issue is one of fundamental fairness, not of weighing the pecuniary costs against societal benefits.... For the value of protecting our liberty from deprivation by the State without due process of law is priceless.[91]

While the other named issues of paternity and dissolutions have not been confronted by the Supreme Court, the rationale imposed by the lower courts has been nearly identical to the reasoning of the Court in Lassiter.

Although the Supreme Court has never directly confronted the issue of the rights to counsel in paternity and dissolutions, there has been a considerable amount of debate on the state level. In most instances, state jurisdiction have used the same analytical structure as the United States Supreme Court did in the Lassiter decision.

Under the subject area of paternity, only four states have declared that indigent defendants have a constitutional right to counsel.[92] Two other jurisdictions have declared that the right exists on other grounds.[93]

The most exemplary of the state decisions establishing the constitutional right to counsel in paternity suits was

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[91] Ibid., at 60.

[92] Alaska, Reynolds v. Kimmons 569 P2d 799 (1977); California, Salas v. Cortez 593 P2d 266 and Los Angeles v. Estes 158 Cal. Rptr. 123 (1979); Michigan, Artibee v. Cheyboygan Circuit Judge 243 NW2d 248 (1976), People v. Marshall 266 NW2d 678 (1978), and Pruitt v. Pruitt 282 NW2d 785 (1979).

[93] New York, B. v. D. 418 NYS2d 271 (1979) on statutory grounds; Minnesota, Hepfel v. Bradshaw 279 NW2d 342 (1979) on grounds of reliable adjudication.

the California case of Salas v. Cortez. In this decision, the Court developed its analysis of potential deprivations of basic rights in two areas.

First, the defendant's constitutionally-protected "liberty" was greatly endangered. Noting that the interest involved in the determination of a parent-child relationship was a "compelling one, ranked among the most basic of civil rights," the Court declared that a paternity determination could have life time ramifications:

> It may disrupt an established family and damage reputations.... It entails an obligation to support and educate a child...an obligation that does not end with the child's majority.[94]

Further, the paternity determination has the potential to deprive a defendant of physical liberty since "failure to support a child may also be prosecuted criminal."[95]

The Court also notes, in a summary fashion, that the most obvious interest threatened is that of property due to the immediate assessment of support payments.[96]

The California court also noted that the complexity of a state initiated paternity action weighs heavily against an unrepresented defendant. The court, in reaching this conclusion, examined two paternity proceedings against indigent men. In these cases,

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[94] Salas v. Cortez, supra., at 230.
[95] Ibid.
[96] Ibid.

> Each appellant made a diligent effort to obtain counsel. Both were ignorant of the intricacies of civil practice and one appellant was not even fluent in the English language. Without the assistance of counsel, neither was in a position to respond adequately to the district attorney's discovery requests nor to initiate discovery himself. Without the assistance of counsel, neither was able to procure the assistance of experts to perform blood group tests which might conclusively have exonerated him. Each was found to be the father of a child on the basis of (1) alleged facts which were deemed admitted because not contradicted, and (2) testimony of the mother which was not subjected to cross-examination. In short, without the assistance of counsel, neither appellant was able to defend against the allegations of the complaint. As a result, each was named the father of a child by involuntary default.[97]

This scenerio is typical of the majority of paternity proceedings instituted against indigent defendants. This imbalance, resulting from state interventation can commonly raise conviction rates in paternity suits to 95%.[98] In the same study of 1000 paternity cases, blood tests taken after an affirmative determination of parentage, revealed that 39.6% of the men accused could not have been the fathers of the children.[99] Thus, state courts have determined that appointed counsel would have a great impact in increasing the accuracy of paternity determination.

These two factors: the basic interests involved; and, the likely result of increased accuracy in paternity determinations, have been the primary justification for states

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[97] Ibid., at 232.

[98] Helpfel v. Bradshaw, supra., at 346.

[99] Ibid.

III. PROPERTY IN THE BALANCE: IS THE DEFENSE OF THE POOR LESS ESSENTIAL?

> It is one of the ironies of our legal system that if the state seeks to incarcerate a person for even a single day on the least consequential of charges, the Constitution requires that counsel be provided; but if the state seeks to fire a person from a job, or confiscate all his property there is no right to counsel.[106]

The Supreme Court, although refusing to appoint counsel, has established certain procedural protections when property interests are threatened. Regardless of the significance of the property in dollar terms, an individual has a constitutional right to a hearing before the state can seize the property.[107]

The requirements of the constitutionally-required hearings, however, are relatively undefined. The Court's language states the hearing requirements are as follows:

> The formality and procedural requisites for the hearing may vary, depending upon the importance of the interests involved and the nature of subsequent proceedings;
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> . . . the nature of the hearing will depend on appropriate accomodation of the competing interests;[108] and,[109]

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[106] Hariman, Due Process of Law (1978), p. 239.

[107] Board of Regents v. Roth, 408 U.S. 561 (1972); Fuentez v. Shelvin, 407 U.S. 67 (1972); Goss v. Lopez, 419 U.S. 565 (1975); and, Mathews v. Eldrige, 424 U.S. 319 (1976).

[108] Board of Regents v. Roth, supra., at 570.

[109] Fuentez v. Shelvin, supra., at 80.

> The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'[110]

Despite these elusive standards, the Court has concluded that overall, the hearing must provide a "real test" to avoid "unfair and mistaken deprivations of property."[111]

One important question remains: what do these standards require, in procedural terms, to protect the property rights of any individual in any given situation? The very nature of the Court's due process interpretations makes this practical question rhetorical at best. As the Court has repeatedly stated, "due process is flexible and calls for such procedural protections as the situation demands."[112] Thus, the procedural due process requirements are ad hoc in nature; each judge must, on a case-by-case basis, determine what process is due. This ad hoc system necessarily subjects constitutionally-guaranteed property rights to subjective evaluation at the trial level.

To guide the judge in the lower levels of the judiciary, the Court has established additional subjective standards. The level or process to be afforded in any given situation is to be determined by three factors:

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[110] Mathews v. Eldrige, supra., at 333.

[111] Fuentez v. Shelvin, supra., at 97.

[112] Mathews v. Eldrige, supra., at 334, quoting Morrisey v. Brewer, 408 U.S. 471, at 481 (1972).

> 1) the private interest that will be affected by the offical action;
> 2) the risk of any erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards; and,
> 3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.[113]

This process of judicial balancing, as has been evidenced in previous analysis, is inherent to almost all right to counsel cases. Interestingly, it is the same type of procedural test that fell to heavy criticism in Gideon v. Wainwright in 1963.[114]

Even though this balancing process has been described as devoid of a systematic pursuit of due process values,[115] a brief review of these standards can be used to justify the imposition of strict procedural standards -- standards including the right of appointed counsel.

A. THE PRIVATE INTEREST

Despite the low ranking of property interests among the areas protected by the Fourteenth Amendment, the language

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[113] Mathews v. Eldrige, supra., at 335; quoting Goldberg v. Kelley, 379 U.S. 254, at 263-271 (1970) See also Lassiter v. Department of Social Services, supra.

[114] See references to Gideon v. Wainwright in previous analysis, Section II.

[115] Nowak, et al, at 503.

of the Court implies a high level of respect for property institutions. The Court has repeatedly stated that:

> . . . the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of government interference.[116]

Similarly, the Court has developed strong language with regard to the ability of individuals to gather property and acquire possessions. As Justice Hughes stated in 1915,

> the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity of the (Fourteenth) Amendment to secure.[117]

By implication, this language reflects the strong dedication of our forefathers, which was vested in the Declaration of Independence. Surely few would deny that the "pursuit of happiness," which captured such a prominent position in our nation's history, includes those fundamental property rights.

The private interest reaches an even greater significance when one considers the indigent. The indigents have

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[116] Fuentez v. Shelvin, supra., at 81; See also, Mathews v. Eldrige, supra.; Board of Regents v. Roth, supra.; Lynch v. Household Finance Corp., 405 U.S. 538 (1972); and Sniadach v. Family Finance Corp., supra.

[117] Truax v. Raich, 239 U.S. 33, 41 (1915); A similar theme was reflected in Meyer v. Nebraska, supra., and Board of Regents v. Roth, supra., (J. Marshall dissenting).

already suffered from the inadequacies of our economic system; the poor are at best on the bottom rung. By virtue of their economic status relative to the remainder of society, their interest in preserving what little property they have is even greater.

For example, consider the litigation within a small claims court. Imagine two defendants hailed into the same court on the same day. The monetary claim against both amounts to $500.00. Defendant #1, an indigent, earns a meager $3,000.00 per year. Defendant #2, however, earns $30,000.00 per year. If a judgment is entered against each for the full amount of the complaint, the interest of the defendants is hardly equal.

The vested property interest of defendant #2 represents only one-sixtieth of his total annual income. The judgment against defendant #1, represents one-sixth of his yearly subsistence, and could push him even deeper into poverty. By reason of this example, it becomes apparent the property interests, and subsequent deprivations by the state, are relative to the individual's economic status.

Property, by the language of the Court, is a special institution in our political scheme. Property to the indigent defendant represents the same constitutional priority with an additional intensity created by his relative economic position.

B. THE RISK OF ERRONEOUS DEPRIVATION

The nature and scope of property-oriented litigation

is too massive to consider in every possible application. For the purpose at hand, the analysis in this section will be limited to the small claims jurisdiction of our courts. This area is perhaps the most beneficial to examine, since it is exemplary of the inherent deficiencies created by subjective applications of the due process doctrine.

In recent years, small claims courts have strained under burgeoning case loads. The majority of this load has been piled upon the overburdened court systems by large businesses. Studies show that nearly 90 percent of all cases in small claims jurisdiction are filed by collection agencies, finance companies and utilities against individuals.[118]

This fact alone creates an inherent imbalance in any subsequent action. The business has massed its forces, hired attorneys and proceeded into a state-sanctioned institution to collect a debt. The indigent who lacks the familiarity and knowledge of the adversary system, is left alone to sift for himself. This inadequacy is accentuated by the realization that the state accepts this disparity in resources; and passes judgment upon the case. It is true that the state does not create this imbalance. The state does, however, have a constitutional obligation to prevent erroneous deprivations of property. If the state affords only a hearing, without the benefit of counsel to equalize

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[118]Downie, Justice Denied, (1976), p. 82.

the imbalance in resources, how can the state fulfill its obligations?

Further exacerbating the situation, is the conclusion of a study on garnishments by the House Subcommittee on Consumer Affairs. The committee chairman concluded:

> what we know from our study of this problem is that in a vast number of these cases the debt is a fraudulent one, saddled on a poor ignorant person who is trapped in an easy credit nightmare, in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up his pound of flesh . . .[119]

The simplicity of requirement of a hearing prior to property deprivations sharply increases the need for appointed counsel. In real terms, a creditor in open court need only prove the existence of the debt. The defendant's defenses, in this situation are limited to proving payment. This leaves open the questions, among others, of product function, the legitimacy of the debt, and whether or not the vendor has complied with the terms of his sales contract. At present, most jurisdictions do not have the time or the disposition to reap this information and prepare it for legal digestion.[120]

Without receiving the valuable and exceedingly pertinent information, in a form that can be readily consumed by the court, the adversary system fails to fulfill its potential.

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[119]114 Cong. Rec. 1832

[120]Downie, pp. 80-84.

This problem was put into concise and direct form by Federal Judge Jack Weinstien, who said, "I cannot do my job in our adversary system unless parties are adequately represented by counsel." Without this measure in civil matters, he concluded, the "courts won't work properly."[121]

Under the present lopsided system, the defendant most often loses in small claims court. This fact is changed by only one factor: representation by counsel. As one author observed, when defendants come to small claims courts with attorneys, "claims against them in the majority of cases are cut in half or dismissed outright."[122]

C. THE PUBLIC INTEREST

The third and final weight to consider is the government or public interest involved in the litigation of property interests. The government has one overriding interest that would justify the appointment of counsel in property cases: social control.

The social control rationale is a simple one. If the poor are allowed meaningful access to the courts, the judicial system will be viewed by the poor as a legitimate means to redress grievances. By establishing this level of participation, the impoverished are given the benefits of - and faith in - the system of governance. Thus, the threat of violent revolution as a means of redress is

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[121]Hariman, p. 239.

[122]Downie, p. 83.

replaced by a controlled, societal mechanism, the courts.

This theory is deeply rooted in the tradition of the provision of legal services to the poor. Early in the 20th Century, newly-developed legal aid societies used the social control theory as its primary justification. Theodore Roosevelt, then Police Commissioner of New York, was a major proponent of the New York Legal Aid Society. In a 1901 speech to the society, he described an actual case in which he had observed in the Society's office:

> A glazier came in and related that he had set twenty-two panes of glass in a barn and that the owner of the barn had refused to pay him $6.60, the agreed price. He had been out of work and needed this money to buy bread and milk for his family's supper. On his way home from the West Side, where had had worked, to the East Side, where he lived, he crossed Fifth Avenue at Forty-fourth Street and passed the luxurious restaurants on either corner. His own children went to bed supperless.
>
> The next morning he sought out a lawyer, who told him that to bring suit the costs and the fee would be ten dollars. This he could not pay. From there he went to the Municipal Court, originally known as "The Poor Man's Court," where he saw a judge, who was obliged to explain that he had neither the time, nor the money, nor the right to undertake the necessary proceedings; that as the man had no money, he could not prosecute the case; and that, inasmuch as the expenses would exceed the amount in dispute, he had better drop it. As the man told his story, sitting in the office of the legal aid society, he was an incipient anarchist.[123]

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[123] Smith, Justice and the Poor (1971), pp. 10-11

Many members of the early legal aid movement spoke of "social and commercial friction"[124] that results from the denial of justice for the poor. By far the most ominous, and perhaps the most comprehensive view of the highly-violated situation came from Lyman Abbott. Speaking with Roosevelt at the 1901 meeting, Lyman concluded:

> If ever a time shall come when in this city only the rich man can enjoy law as a doubtful luxury, when the poor who need it most cannot have it, when only a golden key will unlock the door to the courtroom, the seeds of revolution will be sown, the firebrand of revolution will be lighted and put into the hands of men, and they will almost be justified in the revolution which will follow.[125]

While it is true that these statements were made relatively early in judicial consideration of the right to appointed counsel, these are not idle, antiquated words. Similar concerns were aired in the socially-turbulent 60's. Jean Cann, at the 1965 National Conference on Law and Poverty, said:

> In community after community, I have seen among the indigent a mounting frustration, a mounting sense of indignity, the mounting expectations . . . And despite the attempts of the entrenched to keep control, the poor will increasingly demand their due . . . The time is upon us then . . . all the poor . . . will one way or another throw off the yoke of enslavement in the daily details of their lives and demand the right to participate as equals in the

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[124] Ibid., at 10.

[125] Ibid., at 12.

> political, economic and social benefits of this country.[126]

The social unrest of this decade eventually involved political actors. Sergeant Shriver, in less than a year, became very involved in the concept of "public participation."[127] The concern of political figures for the plight of the poor manifested itself in a comprehensive program, The Office of Economic Opportunity. This parent program developed a system for providing legal representation to the poor. This program eventually became the Legal Services Organization (L. S. O.).[128]

Again, the focus of this program was to enhance public participation. The first director of the Legal Services Program, Clinton Bamberger, was less than enthusiastic about the new concern for public participation. At an organizational meeting on "maximum feasible participation", Bamberger opened the meeting saying he was "willing to have the idea discarded."[129] He emerged from that meeting with a strong conviction as to the necessity of legal counsel for the poor. Two months later, at a symposium at Notre Dame Law School, Bamberger spoke on citizen participation:

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[126] Larsen, "Seven Years With Legal Aid," 11 MANITOBA LAW REV. 237, at 246.

[127] Ibid., at 247.

[128] 6 CONG. DIGEST 131 (1981)

[129] Larsen, pp. 245-246.

> There must simply be meaningful representation - representation which will bring to the councils of charity voices angry with the failures of charity and which will produce a fruitful dialogue between groups that may have never talked to one another before . . .
>
> This principle of participation is not a conversation piece; it has been applied.[130]

This concern for "public participation" was expressed against a backdrop of protest marches, campus unrest and racial violence. For the present social order, the only means to reestablish social control was to allow the poor and dissatisfied members of the population to affect social change. This necessarily led to the establishment of the L. S. O.

The difficulty in this area, is attempting to assess the total impact of L. S. O. It is a practical impossibility to create a scientifically-viable study to measure the L. S. O.'s impact in real terms on social unrest. Whatever the statistical value may be, it is apparent that social control is accepted as a direct result of such government activities. Therefore, social control is an implied, and very valuable result of such undertakings.

One thing is certain, whatever was accomplished in the 1960's and 1970's by the L. S. O., is non-existent today. In 1980, the budget-conscious Reagan Administration proposed that the L. S. O. not be reauthorized for 1981.

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[130] Ibid.

Since that time the program has limped along on partial funding from a continuing Congressional resolution.[131]

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[131]Executive Office of the President, Major Themes and Additional Budget Details (FY 1983), pp. 33-34.

IV. WHO SHALL PAY?

If there is a bottom line, or a final weighted factor in determining whether appointed counsel is to be required, it is the additional cost of that counsel. This fiscal issue has underlined virtually every right to counsel case considered in this analysis. As early as 1941, in Betts v. Brady, where the Supreme Court denied the right to appointed counsel in non-felony cases, the decision rested, in some degree, on economic rationale. The Court, expressing a fear of fiscal impact, stated:

> Charges of small crimes tried before justices of the peace and capital charges tried in higher courts would equally require appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it.[132]

The ultimate concern of the Court was that counsel would, by the "logic of the Fourteenth Amendment," be required "in civil cases involving property."[133]

Nowhere was the economic rationale of the Court more apparent than in Justice Clark's dissent in Douglas v. California. In this case, the majority held that a California rule allowing the discretionary appointment of counsel for indigents on "legitimate" appeals only was violative of the Equal Protection Clause. Clark, blasting

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[132] Betts v. Brady, supra., at 473.

[133] Ibid.

the majority's ruling, remarked:

> I cannot understand why the Court says that this procedure afforded to the petitioners is 'a meaningless ritual.' To appoint an attorney would not only have been utter extravagance and a waste of the state's funds but as surely 'meaningless' to the petitioners.
>
> With this new fetish for indigency the Court piles an intolerable burden upon the state's judicial machinery.[134]

In recent years, with the fiscal conservationism of the justices increasing, the monetary concerns of the Court have increased. The dissenters have now adopted the cry of the majority since the Warren era.

Nothing is more exemplary of this fundamental economic conservationism than the Court's 1981 holding in Lassiter v. Department of Social Services. The majority denied the right to appointed counsel in parental right terminations on fiscal rationale. In a stinging dissent, Stevens branded the Court for its preoccupation with "material resources."[135] Stevens then concluded:

> The issue is one of fundamental fairness, not of weighing the pecuniary costs against societal benefits . . . For the value of protecting our liberty from deprivation by the State without due process of law is priceless.[136]

Likewise, state courts are susceptible to the same

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[134] Douglas v. California, supra., at 359.

[135] Lassiter v. Dept. of Social Services, supra., at 59.

[136] Ibid., at 60.

type of economic pressures. As described in Section II, New York appeals courts have refused to establish broad right to counsel decisions in dissolutions. The reason was simple: allocations of public funds for such matters should be made in the legislature rather than in the courts.[137]

One conclusion is apparent. Whatever the form of reasoning, or judicial balancing, central to the question of whether appointed counsel is required, is one question: who shall pay?

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[137] Re Smiley, supra.

V. CONCLUSION

The economic rationalizations occurring under the due process and equal protection doctrines are more expansive than indicated in the previous section. The entire subjective system leans toward economic considerations.

The criteria employed by the judiciary is dependent upon an economic cost-effective rationalization. The newly-considered procedutes are evaluated in terms of the additional cost and burden to the state. The interest, whether liberty or property, is then rationalized according to the additional cost. The problem begins at this point. The values associated with liberty and property cannot be reduced to a universally accepted value. In effect, the courts are weighing unlike factors.

With the magnitude of interests on all sides, the central question becomes rather basic: Should the level of protection afforded to constitutionally-enumerated interests be subjected to the ecomomic rationalizations of individual judges? It is doubtful that any democratic system would allow the basic procedural rights of its citizens to be subjected to continual re-evaluations by individual judges.

In order to secure the full protection of constitutionally defined interests for the individual, and the collateral benefits to society, a procedural rule requiring the appointment of counsel for indigent defendants should be established in all civil areas.

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